In the Supreme Court of the United States

OCTOBER TERM, 1970

NO. 369

ISAAC TIKTIN AND SOL TIKTIN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

An indictment returned in the United States District Court for the Northern District of Ohio charged petitioners with the use of interstate facilities to promote an illegal gambling enterprise, in violation of 18 U.S.C. 1952, and with conspiracy to violate that statute. On September 28, 1968, the District Court entered an order suppressing as evidence gambling paraphernalia and related items which had been seized under search warrants issued on the basis of affidavits alleging violations of the federal wagering tax laws. The government appealed and the court of appeals reversed the ruling of the District Court and re-

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manded the case for further proceedings (Pet. App. 17–23).[1]

The primary question raised by petitioners here is whether the holdings by this Court in *Marchetti* v. *United States,* 390 U.S. 39, and *Grosso* v. *United States,* 390 U.S. 62, require the exclusion of evidence seized under search warrants which were executed prior to the date of those decisions and were based upon alleged violations of the provisions of the wagering tax laws involved in those decisions. This is precisely the issue raised in *Hanon et al.* v. *United States,* No. 358, this Term, and *Kuhn* v. *United States,* No. 5088, this Term.

As we point out in our memorandum in opposition filed in *Hanon,* a copy of which is being furnished to petitioner's counsel, *Marchetti* and *Grosso* hold only that those who properly assert the privilege against self-incrimination may not be criminally convicted for failure to file wagering tax returns. This does not mean, however, that a search warrant, which was valid when issued (*United States* v. *Kahriger,* 345 U.S. 22; *Lewis* v. *United States,* 348 U.S. 419), can now be retroactively set aside because based on affidavits alleging a failure to file such returns. We point out that here petitioner is not charged with the offense involved in the decisions by this Court in *Marchetti* and *Grosso,* but instead has been indicted for other al-

[1] It relied on its opinions in *United States* v. *One 1965 Buick,* 397 F. 2d 782, pending on application for a writ of certiorari, *sub nom, Dean* v. *United States,* No. 8, this Term, and in *DiPiazza* v. *United States,* 415 F. 2d 99, pending on application for writs of certiorari, Nos. 67, 68, this Term.

leged gambling violations unrelated to the Fifth Amendment issue. In these circumstances, the court below properly concluded that the government should not be deprived of the use of reliable evidence that was entirely lawful when obtained. See *Desist* v. *United States,* 394 U.S. 244; *Tehan* v. *Shott,* 382 U.S. 406; see also *United States* v. *Wallace Co.,* 336 U.S. 793.[2]

United States v. *United States Coin and Currency in the Amount of $8,674, Donald Angelini, Claimant,* No. 5, this Term, presents the questions whether the decisions in *Marchetti* and *Grosso* should be applied to forfeiture proceedings directed against property used in violation of the federal wagering tax laws and, if so, whether the rule adopted in those cases should be applied where the seizures occurred prior to the date of the decisions. Another question of collateral application of *Marchetti* and *Grosso* is presented in *Mackey* v. *United States,* No. 36, this Term.

For the reasons stated, the petition should be denied.[3] However, since the issue here is related to those presented in *Angelini* and *Mackey,* the Court

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[2] In *Stanley* v. *Georgia,* 394 U.S. 557, 569, the concurring opinion of three members of this Court considered a similar warrant to be valid.

[3] The other question presented—whether the notice of appeal was defective under 18 U.S.C. 3731, as amended—lacks substance. The statement in the notice that the material suppressed "is necessary for the prosecution of the pending criminal charge" indicates clearly, in the light of the issues presented before the district court, that the appeal was not taken for the purpose of delay.

may wish to defer disposition of the petition until after those cases are decided.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970